ORIGINAL

NO. _____

83-5948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

JURISDICTIONAL STATEMENT; APPEAL FROM THE SUPREME COURT OF COLORADO NO. 82SA352

RICHARD VELASQUEZ #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Shadow Mountain Correctional Facility
Canon City, Colorado 81212

Defendant-Appellant, Pro Se

QUESTION PRESENTED FOR REVIEW

DO 18-18-106(1), C.R.S. 1973, (1981 Supp.) and 18-18-106(4)(a), C.R.S. 1973 (1981 Supp.) PROSCRIBE THE SAME CONDUCT BUT PROVIDE FOR DIFFERENT PENALTIES, ONE A CLASS 2 PETTY OFFENSE AND THE OTHER A CLASS 5 FELONY AND THUS VIOLATE EQUAL PROTECTION AND DUE PROCESS? DID THE DECISION BELOW ALSO VIOLATE THE SEPARATION OF POWERS DOCTRINE AND THE SUPREMACY CLAUSE.

PARTIES TO THE PROCEEDING

Richard Velasquez, the Defendant-Appellant herein, is proceeding Pro Se in this proceeding as he did in all proceedings below. The People of the State of Colorado, the Plaintiff-Appellee herein, were defended by the Office of the District Attorney, Seventh Judicial District, State of Colorado, P.O. Box 1640, Montrose, Colorado 81401 in all proceedings below and are still the party of record for the Plaintiff-Appelle as far as Defendant-Appellant knows.

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The official report for this case is People v. Velasquez, No. 82SA352, Colo., 666 P.2d 567 (July 18, 1983).

NATURE OF PROCEEDINGS

Richard Velasquez, the Defendant-Appellant herein, is hereinafter referred to as Appellant. The People of the State of Colorado, the Plaintiff-Appellee herein, is hereinafter referred to as Appellee.

Appellant was arrested at approximately 12:45 a.m. on December 1, 1981, for the alleged offense of Driving Under the Influence of Intoxicating Liquor, §42-4-1202, C.R.S. 1973, as amended. Following that arrest, and during a pre-custodial search prior to Appellant's incarceration, Appellant was alleged to be in possession of a quantity of a suspected controlled substance, marijuana resin, said substance constituting four small blocks of a hard resinous brown substance wrapped in tin foil and plastic. These items were submitted to the Montrose Regional Laboratory of the Colorado Bureau of Investigation for expert analysis, which analysis resulted in a finding that they were in fact Cannabis sativa L. Thereafter, Appellant was charged by Complaint and Information in Case No. 81F130 with Possession of Marijuana Concentrate (Hashish) in violation of §18-18-106, C.R.S. 1973, (1981 Supp.), a class 5 felony. Appellant was also charged with two counts of Second Drug Conviction based on other alleged prior convictions also in violation of §18-18-106, C.R.S. 1973 (1981 Supp.), class 4 felony. Appellant was arraigned on December 1, 1981 before the Honorable Richard J. Brown, County Court Judge, Montrose County, Colorado. A preliminary hearing was held on December 14, 1981 and probable cause was found and Appellant was then arraigned in District Court on December 17, 1981. Thereafter, and until May 24, 1982, numerous motions were filed by Appellant herein and hearings had thereon before the trial court. However, only one of said preliminary motions is relevant to the single issue presented in the appeal to the Supreme Court of Colorado and that being Appellant's Motion to Dismiss. Appellant's first Motion to Dismiss being dated February 15, 1982 (p. 104 of the Index) and the second one being filed May 24, 1982 (p. 182 of the Index).

Trial, to a jury of twelve, commenced on May 24, 1982, and continued through May 25, 1982. At the close of the Appellant's case but prior to

presenting the issue to the jury for a verdict, Appellant moved to dismiss the charge of Possession of Marijuana Concentrate, class 5 felony, on numerous grounds all of which had been raised in Appellant's previous Motions to Dismiss. The evidence that had been presented consisted of two (2) witnesses called by Appellant and one (1) called by the Appellee. The motion was granted by the trial court on the grounds that §18-18-106(1), C.R.S. 1973 (1981 Supp.), a class 2 petty offense, and §18-18-106(4)(a), C.R.S. 1973 (1981 Supp.), a class 5 felony, violate equal protection and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, §§6 and 25 of the Colorado Constitution. The two subsections and paragraph proscribe the same conduct but provide two different penalties. The trial court ordered the case dismissed (p. 206-207 of the Index). The trial court did not rule on any of the other issues raised in the case.

Thereafter, after appropriate extensions of time, Appellee filed their Notice of Appeal on July 30, 1982. Appellee was also granted extensions of time to file their Opening Brief which was filed December 10, 1982. Appellant filed his Answer Brief on January 12, 1983. The trial court's judgment was disapproved by the Supreme Court of Colorado on July 18, 1983 which stated that the statutes proscribing possession of marijuana and marijuana concentrate do not violate equal protection. Appellant then filed a Petition For Rehearing which was denied En Banc by the Supreme Court of Colorado on August 18, 1983. Appellant filed a copy of his Notice of Appeal in the District Court, Montrose County, Colorado on November 8, 1983. Appellant mailed a Notice of Appeal to the Supreme Court of Colorado on November 4, 1983; filed November , 1983.

The statutory provision Appellant is relying on to confer jurisdiction of this appeal on this Court is 28 USCA §1257 and Rules 10-13, 15, 28 and 46 of the Supreme Court of the United States.

CONSTITUTION OF THE UNITED STATES

ARTICLE XIV

1. Citizenship defined-privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO CONSTITUTION

Section 6. Equality of Justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

Section 25. Due process of law. No person shall be deprived of life, liberty or property, without due process of law.

COLORADO REVISED STATUTES

1981 CUMULATIVE SUPPLEMENT

§12-22-303(17). "Marihuana" or marijuana" means all parts of the plant cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, cake, or sterilized seed of the plant which is incapable of germination.

§12-22-303(18). "Marihuana concentrate" means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols.

§18-18-106. Possession of marihuana - dispensing to minor.(1) Any person who possesses not more than one ounce of marihuana commits a class 2 petty offense and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars.

§18-18-106(4) Any person who possesses more than one ounce of marihuana or any amount of marihuana concentrate commits:

(a) A class 5 felony;

HAWAII REVISED STATUTES

§712-1240(6). "Marijuana" means any part of the plant (genus) cannabis, whether growing or not, including the seeds and the resin, and every alkaloid, salt, derivative, preparation, compound, or mixture of the plant, its seeds or resin, except that, as used herein, "marijuana" does not include hashish, te-

trahydrocannabinol, and any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized of tetrahydrocannabinol. [Emphasis added]

§ 712-1240(7). "Marijuana concentrate" means hashish, tetrahydrocannabinol, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinol. (Emphasis added)

§ 712-1240(2). "Harmful drug" means any substance or immediate precursor defined or specified as a "Schedule III substance" or a "Schedule IV substance" by Chapter 329, or any marijuana concentrate except marijuana. (Emphasis added)

§ 712-1244(1)(d), in relevant part, provides that "[a] person commits the offense of promoting a harmful drug in the first degree if he knowingly: ... [d]istributes one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one-eighth ounce or more, containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof." (Emphasis added) Promoting a harmful drug in the first degree is a Class A felony carrying with it a maximum penalty of 20 years and/or $10,000 fine.

§ 712-1248(1)(d), on the other hand, provides that "[a] person commits the offense of promoting a detrimental drug in the second degree if he knowingly: ... [s]ells any marijuana or distributes any Schedule V substance in any amount." (Emphasis added) Promoting a detrimental drug in the second degree is a misdemeanor the maximum penalty for which is one year and/or $1,000 fine.

Appellant did not have access to the Hawaii Revised Statutes but took the above statutes from State v. Petrie, Hawaii, 649 P.2d 381 (1982) as they were quoted there.

STATEMENT OF THE CASE

The issue in this appeal involves the dismissal by the trial court of the charges against Appellant based on the fact that §18-18-106(1), C.R.S. 1973 (1981 Supp.) and §18-18-106(4)(a), C.R.S. 1973 (1981 Supp.) violate equal protection and thus Appellant would only be guilty of a class 2 petty offense rather than a class 5 felony. The Appellee choose not to pursue the case as a class 2 petty offense and appealed the decision of the trial court to the Supreme Court of Colorado which disapproved the decision of the trial court.

Appellant raised this issue from the beginning of the case and has continued to do so throughout all proceedings concerning this case. As stated in Appellant's Nature of Proceedings, this issue was first raised in his Motion to Dismiss dated February 15, 1982 (p. 104 of the Index) and again in another Motion to Dismiss filed May 24, 1982 (p. 182 of the Index). All the evidence and testimony presented at trial and the hearings concerning this issue all supported Appellant's argument. Appellee presented no evidence whatsoever in support of their argument.

Testimony was presented by Agent/Criminalist Gary P. Koverman for the Appellee, which established that the substance in question was in fact Cannabis sativa L. but was in a form that is sometimes called Hashish. He also stated that this substance is a preperation of the plant Cannabis sativa L. This testimony supported Appellant's argument and was solicited by Appellant in his examination of the witness. Mr. Koverman was employed by the Colorado Bureau of Investigation at the time and performed the chemical tests for Appellee.

Testimony was presented for Appellant by Dr. Robert K. Lantz, Technical Director of Rocky Mountain Laboratories, 2107 Templeton Gap Rd., Colorado Springs, Colorado 80907 and Nelson K. Jennett, M.S., Forensic Consultant, Montrose, Colorado. Both these experts have worked for the Colorado Bureau of Investigation and various other law enforcement agencies. Both now work in private practice but still do work for law enforcement or private individuals whenever they are hired to do so. Both testified that the substance in question is in fact Cannabis in a form that is sometimes called by it's slang name of Hashish. They also testified that the substance is in fact resin of the Cannabis plant as it is known to his profession rather than the street name of Hashish. They also agreed that this substance is also a derivative, or

preparation of the plant. They also agreed that the marijuana definitions and laws are vague and confusing to a person of their profession and do not conform to the definitions that are known in their professions. Dr. Lantz's opinion about the vagueness of the definitions was noted by the Trial Court but not ruled on and is so stated in the Order of May 26, 1982 (p. 206-207 of the Index). The experts also stated that the substance in question is not a concentrate and so testified.

Based on the evidence of the above experts, but particularly basing his decision on the testimony of Dr. Lantz, Judge Lincoln found that the two statutes proscribe the same conduct but provide different penalties and thus violate equal protection and dismissed the felony counts against Appellant.

Appellee also submitted the case of People v. Magoon, Colo.App., 645 P.2d 286 (1982) and stated that it is dispositive of the issue herein. This is untrue as the trial court so stated in its order of May 26, 1982 (p. 206 of the Index). The trial court stated that it finds that this case is not controlling in that it did not address the very specific issue set forth in Appellant's case.

People v. Magoon, supra, did address the same issue as Appellant but no evidence was introduced by the defense in that case to counter the prosecution. This was not the case in Appellant's case as he provided two experts on his behalf and much testimony, dictionary definitions, and the testimony of the prosecution's expert all of which supported his argument. The relevant portion from the Opinion of the Court of Appeals states as follows:

> "The testimony of the prosecution's expert witness in this case, while less than a beacon of scientific clarification, was sufficiently illuminating to establish that two separate substances, marijuana and hashish, were seized from the defendants. This witness was not cross-examined regarding his testimony that cannabis and marijuana were synonymous, by any defense witnesses. Thus, we reject defendant's arguments. People v. Magoon, supra.

In addition to the testimony stated above by the experts, Dr. Lantz also testified that the substance in question is not a concentrate because it was in it's natural form. He stated that to get a concentrate it must be obtained by chemical means. The substance in question was concentrated by the plants own process and appeared as it would before it was scraped from the plant and to consider this to be a concentrate you would also have to classify the cannabis plant itself to be a concentrate. Dr. Lantz stated that his examination

showed particles of dirt and pieces of the plant in the resin in question. He said that this shows that it is in it's natural form as this dirt and pieces of plant would not be present in a true concentrate that was prepared by chemical means. A true concentrate would also be more potent as it would not contain any impurities. Various methods for preparing the substance in question appear in the testimony and are partially discussed in the trial court's Order of May 26, 1982 (p. 206-207 of the Index).

Appellant also presented dictionary definitions on the words Hashish and hash to show the confusion that can be caused by not providing a definition in the statutes as the Colorado Statutes do not contain a definition for Hashish in order to distinguish it from resin. The Colorado Supreme Court did not rule on the issue of there not being a definition for Hashish in the statutes but Appellant had presented it in his motions in the trial court and also on appeal. The definitions are:

> Black's Law Dictionary, Fifth Edition, 1979 p. 646:
> Hashish. Drug which is formed of resin scraped from the flowering top of the cannabis plant, as distinguished from marijuana which consists of the chopped leaves and stems of the cannabis plant.
>
> Webster's International Dictionary:
> Hash (hash) vt. [Fr. hacher, to chop] to chop up (meat or vegetables) for cooking--n. 1. a chopped mixture of cooked meat and vegetables, usually baked 2. a mixture 3. a muddle; mess 4. [Slang] hashish.
> (hash'ish, -ish) n. [Ar. hashish, dried hemp] a narcotic and intoxicant made from Indian hemp.
> p. 283: hemp (hemp) n.
> [OE. Hænep] 1. a tall Asiatic plant having tough fiber 2. its fiber, used to make rope, sailcloth, etc. 3. a substance, as hashish, made from its leaves and flowers.

Thus it is obvious that the ruling of the trial court is proper and should be affirmed. As is shown above, there are several meanings for the word hashish and there are probably more which Appellant has not encountered yet. Therefore, it is confusing to have the word hashish in the definition of "marihuana concentrate" and not to have a statutory definition for this word to distinguish it from the resin of the plant cannabis sativa L. as the resin is included in the statutory definition of Marihuana.

Appellant has included the definition of "hash" in this paper because he has heard and read that this is another slang name for Hashish. This is also the word used for Hashish by many law enforcement officers. The word "hash" is also used by the arresting officer in this case in his police report of

:2/1/81. The word "hash" is also used by the Montrose Police Department in the Official Request For Laboratory Examination that they submitted to the Colorado Bureau of Investigation dated 12/1/81.

It is obvious that a separate definition for Hashish is necessary to disguish it from marijuana and marijuana resin. The Colorado Statutes do not contain a proper definition for hashish and Appelle has apparently relied on the penalty section of the statutes more than anything else to distinguish the two. A case that discusses such a situation is State v. Kelman, Mont., 649 P.2d 1292 (1982) and other cases cited therein. The cases state that the necessary elements of a statutory offense cannot be supplied by the penalty section of a statute and that the Court will not indulge in inferences to create a crime that is neither adequately defined by law or charged by information.

Appellant also cited other cases in support of his position although they did not discuss the issue at length. Courts use of the word "hashish" rather than "cannabis sativa L." did not render instruction erroneous. Court judicially noticed that "hashish" is a derivative of cannabis sativa L. People v. King, Colo., 498 P.2d 1142 (1972); also considered in Zisto v. People, 171 Colo. 38, 465 P.2d 406; Martinez v. People, 160 Colo. 333, 417 P.2d 485; Jordan v. United States, 345 F.2d 302 (10th Cir. 1965). State v. Navaro, 83 Utah 8, 26 P.2d 955 (1933) discusses the definition of "marihuana". Other cases that discuss this issue are United States v. Cimoli, 10 M.J. 516 (AFCMR 1980); United States v. Lee, 1 M.J. 15 (CMA 1975); and United States v. Ashworth, 47 CMR 702 (1973).

The cases Appellant cited to support his equal protection argument are People v. Czajkowski, Colo., 560 P.2d 23 (1977); People v. Hulse, Colo., 557 P.2d 1205 (1976); People v. Burns, Colo., 563 P.2d 351 (1979). Appellant has not encountered a United States Supreme Court case that has discussed this type of issue and thus does not know if they have decided the issue of two statutes that proscribe the same conduct but provide different punishments. Appellant does not have access to all the cases though due to the fact that he is incarcerated and the facility here does not have all of the cases or books that an adequate library has. The court has discussed equal protection and different punishment for the same acts under like circumstances by persons similarly situated in a case involving different types of civil commitments in Baxstrom v. Herald,

383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

The Colorado Supreme Court on p. 6 of it's Opinion that hashish, which is the resin of the marihuana plant, satisfies both the statutory definition of marihuana §12-22-303(17), C.R.S. 1973(1982 Supp.) and the statutory definition of marihuana concentrate in §12-22-303(18), C.R.S. 1973(1982 Supp.). The Court went on to state that "Because hashish is marihuana, however, does not mean that all marihuana is hashish." Appellant agrees that there are many different forms of marijuana that can be formed from the Cannabis plant but they are all marijuana and are all contained in the definition of marijuana. Even tetrahydrocannabinols is contained in the marijuana definition as well as in the marijuana concentrate definition. THC also has a separate definition of it's own in the Colorado statutes while hashish does not. Another form of potent marijuana is resin oil, also known as hashish oil, but it is not included in the marijuana concentrate statute but is included in the marijuana definition. Resin oil is considered to be more potent than resin and yet the statutes provide a lesser penalty for it. The different forms of marijuana is endless and it would require consulting an expert on the subject to be able to determine them all. The Opinion of the Colorado Supreme Court is misplaced as it talks about the THC content of the various types of marihuana that are contained in the plant Cannabis sativa L. and attempts to distinguish them from the plant itself. Marihuana is not the plant itself but is:

> §12-22-303(17), C.R.S. 1973(1981 & 1982 Supp.): "Marihuana" or "marijuana" means all parts of the plant cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, cake, or sterilized seed of the plant which is incapable of germination.

The Colorado Supreme Court has essentially changed this definition to read:

> "Marihuana" or "marijuana" means all parts of the plant cannabis sativa L., whether growing or not, and the seeds thereof.

The definition would also contain a phrase that would exclude all other parts of the definition listed above except for the parts that are underlined. It is obvious that the Colorado Supreme Court has misinterpreted the issue and made an improper Opinion. Although the wording of the statutes has not changed, the Court has also exceeded their jurisdiction and violated the separation of

powers doctrine. The courts are supposed to interpret the laws and not change them as they did in this case.

The Colorado Supreme Court's Opinion stated that a marihuana concentrate such as hashish is readily distinguishable from and potentially more intoxicating than marihuana and, therefore, the legislative decision to classify and punish possession of hashish differently than the possession of marihuana is a reasonable exercise of its lawmaking function. This particular issue was argued by the Appellee in the trial court but was not an issue on appeal as it has nothing to do with the definitions in the statutes.

The trial court considered the issue as decided by the Colorado Supreme Court as it stated that "It appears to this Court that the Legislature attempted to make a reasonable distinction in that marijuana concentrate would be more potent, more easily transported and more easily concealed, but in spelling out the definitions of marijuana and marijuana concentrate they allowed the definitions to overlap. (p. 207 of the Index). The trial court decided the issue on it's interpretation of the statutory definitions and the decision was proper.

The Colorado Supreme Court also relied on other jurisdictions that punish hashish offenses more severly than those for marihuana and this is misplaced also as they do not argue the same issue as Appellant did. Although the issue is similar to Appellant's the circumstances were different in the other cases. State v. Petrie, Hawaii, 649 P.2d 381 (1982) is not on point at all. The statutory definition in Hawaii is worded similar to Colorado's but excludes some parts of the plant Cannabis sativa L. similar to those underlined in the Colorado definition on p. 9 except that the Hawaii statute (p.3-4) also contains the phrase "except that, as used herein, "marijuana" does not include hashish, tetrahydrocannabinols and any alkaloid, etc,". A separate definition is also provided which includes hashish and which defines marijuana concentrate. State v. Petrie, supra at 383. Hawaii also provides different penalties for small amounts of hashish than for large amounts. HRS §712-1244(1)(d); State v. Petrie, supra at 383. 1/8 of an ounce is approximately 3.54 grams and thus relying on the Hawaii statutes Appellant's alleged possession of 2.32 grams would not be considered harmful and thus not subject to felony penalties. Thus the Hawaii case did not argue the same type of equal protection issue that Appellant did and it should not be relied on other than for it's guidance in treatment of

quantities of hashish (cannabis resin). It should also be noted that the experts in Appellant's case also testified that the small amount of resin in question does not contain as much THC as the 13.37 grams of plantlike material that Appellant was also alleged to have possessed but was not ch[illegible] with as it was less than one ounce and thus a class 2 petty offense and the Appellee choose to prosecute the 2.32 grams of resin as a felony instead (p. 23, Vol. 1). The experts also testified that Cannabis resin oil is not defined in the definition of marijuana concentrate but is defined in the definition of marijuana. They stated that this substance has more THC per weight than any other part of the Cannabis sativa L. plant and that this substance is a true concentrate because it can only be extracted from the plant by chemical means and yet possession of this substance is a class 2 petty offense while according to Appellee possession of the resin is a felony.

The reliance on the Hawaii statutes and cases is not on point as is further shown by State v. Choy, Hawaii App., 681 P.2d 1206 (1983). Appellant only recently found this case and thus did not cite it on rehearing. It cites State v. Petrie, supra and further clarifies the intent of the Hawaii legislature concerning this issue. This case involved a defendant that made "fake hash" by mixing marijuana leaves with oregano, putting the mixture in a cloth, compressing it into a tight ball, placing it in boiling water for 15 minutes, allowing it to dry for a couple of days, and then cutting the ball into chunks. He was convicted of possession of marijuana concentrate even though a defense expert stated that the substance produced by Choy's method would contain THC but it would be a lower concentration than that present in the original marijuana leaves. The Court stated that the important fact about the substance in this case is not it's potency but that it contained THC without any recognizable parts of the cannabis plant. The thrust of the statutes is to criminalize possession of the THC in any form other than the identifiable plant. The statutory definition of marijuana concentrate is purely qualitative, not quantitative and is not expressed in terms of potency. Since it is within the broad powers of the legislature, we are bound to follow that legislative definition rather than commonly accepted dictionary or scientific definitions. Thus this case supports Appellant's argument as the experts testified that there were identifiable parts of the plant in the substance that he was alleged to have possessed. The potency is

not the issue but the presence of THC without any recognizible parts of the cannabis plant.

As can be seen by the preceding discussion of the Hawaii cases, these cases support Appellant's argument and the part relied on by the Colorado Supreme Court is not on point. As can be seen by the statutory definition of marijuana in the Colorado statutes, many parts of the plant Cannabis sativa L. are excluded from the definition but it is explicit in that it does not exclude the resin. This is because without the resin there would be no THC and thus no marijuana as law enforcement knows it. As all the experts testified at trial, Cannabis sativa L. which showed no THC content would show a negative reading in their tests and thus no prosecution would result. All three experts testified to this and stated that they have all tested many samples which tested for marihuana in all respects except for the fact that no THC was present and thus they would report a negative finding of no cannabis sativa L. They all stated that they have tested resin samples which have proved negative and contained no THC. They all stated that the resin is the substance that contains THC even when it is still in the plant and that when the resin is removed then the plant will contain no THC and thus test negative for marihuana. The reason some resin samples test negative for THC and thus test negative for marihuana is that the resin is also a compound of several substances other than THC and when the THC is removed it is still resin. THC is actually the pharmacological agent responsible for the intoxicating effect on the user and is actually the substance proscribed by the statutes and thus this is the reason chemists test for THC to determine if the substance is marihuana or not and thus proscribed by the statutes. If a substance does not contain THC it is not proscribed in Colorado even if it can be proven by any other test that it is the plant Cannabis sativa L. or any other part of the plant as defined in the statutory definition. Thus any substance containing THC would be marihuana and vice-versa no matter what it's appearance.

State v. Petrie, supra also relies on the commentary accompanying the Judicial Council of Hawaii's proposed draft of the Hawaii Penal Code (1970). No such commentary from any council or legislative committee was presented in Appellant's case by the Appellee to support their position and it is not proper to do so now and definitely not proper to rely on such testimony from some other jurisdiction. If any such commentary is to be presented in this

appeal it should be from a council or legislative committee from Colorado. The expert testimony at trial indicated that hashish is not any more dangerous nor more harmful than any other part of the Cannabis plant. As was shown at trial, the difference is like comparing 3.2 percent beer with malt liquor or 6% beer. Both are subject to abuse if one so desires and they both produce the same intoxicant effect. Another study was done which compared the "flowering or fruiting tops" of the plant and the cannabis resin as being in the same category while the leaves without the "flowering or fruiting tops" were classified as less harmful as the above two and recommended for schedule V and was also compared to beer. (NORML) v. Drug Enforcement Administration, U.S. Department of Justice, C.A.D.C., 559 F.2d 735 (1977).

As to the fact that Hawaii and Arizona proscribe different penalties for cannabis resin and the cannabis plant, these are exceptions rather than the rule. Appellant was unable to read the State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (1978) case that was also relied on by the Colorado Supreme Court in it's Opinion as the library here does not have it. Appellant does not have access to a library where he can check all the statutes to all the various states, territories, jurisdictions, countries, and various federal courts but will list the ones that he has been able to find. The federal statutes provide the same definition and penalties for all parts of the plant Cannabis sativa L. and the definition is worded almost exactly the same as Colorado's; 21 USC §802(15); 21 USC §§841(4), 844. All species and varieties of cannabis, including hashish, are included in statutory proscription against marijuana. United States v. Kelly, C.A. Idaho, 527 F.2d 961 (1976). The preceding case also discusses the history and legislation consisting of the Act of 1937 and Amendment of 1954 and Act of 1970 and states the Congress intended to outlaw THC. (NORML) v. Drug Enforcement Administration, United States Department of Justice, C.A.D.C., supra also discusses the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Single Convention on Narcotic Drugs (1961) and National Commission on Marijuana and Drug Abuse, Second Report, Drug Use in America: Problem in Perspective, Vol. 1 at 235 (1973). The military courts; United States v. Cimoli, supra; United States v. Lee, supra. State v. Davis, Kansas, 649 P.2d 409 (1982)(K.S.A. 65-4105, 65-4127b[b][3] involving a case with large quantities of cannabis resin (marihuana). See also People v. King, supra; Ziatz v. People, supra; Martinez

v. People, supra; Jordan v. United States, supra; State v. Navaro, supra.

It is also not a proper exercise of the legislatures or judicial lawmaking function to classify cannabis resin and other parts of the cannabis sativa L. plant differently because this is a function that the United States Congress delegated to the Attorney General of the United States and all guidelines for this function are contained in 21 USC §811. United States v. Poya, C.A. Ill., 574 F.2d 386 (1978), cert. den. 439 U.S. 857; (NORML) v. Drug Enforcement Administration, U.S. Department of Justice, supra; United States v. Duquet, N.D. Ill.E.D., 551 F.Supp. 1194 (1982). It is clear that Congress intended the Federal Act to supersede the police powers of the State and thus the Colorado Legislature or any other legislature is in violation of the Supremacy Clause of the Constitution of the United States as set forth in Article VI, Clause II. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, (1947);United States v. Bass, 404 U.S. 336 (1971). Thus it is clear and manifest that the intent of Congress to delegate the classification of controlled substances to the Attorney General of the United States and not to the individual states.

The preceding statement of the case contains everything that Appellant argued to the trial court and the Colorado Supreme Court by motions, briefs and petition for rehearing. Appellant's Answer Brief consisted mostly of argument concerning the definitions as he thought that that was the only issue to be argued on appeal but it did contain a paragraph concerning the dangerousness of hashish compared to marijuana as that was the only thing Appelle argued in their Opening Brief. The rest of the statement was raised in a petition for Rehearing. It also contains a couple of cases not cited before. Appellant also consulted by mail with other experts in this field and they agreed with his position. Appellant was not allowed to subpoena these other experts and most of their correspondence did not arrive in time to be included into the record. They are: Dr. Richard Evans Schultes, Ph.D., Director, Botanical Museum, Harvard University and also a member of the National Academy of Sciences which is an academy organized under President Lincoln to provide a consulting body to the United States government on matters of science. One of his letters appears on (p. 200, Vol. 1). Appellant also consulted by mail with William A. Emboden, P.L.D., F.L.S., Professor of Biology CSUN, Northridge, California.

The question presented in this appeal is substantial enough to require

plenary consideration, with briefs on the merits and oral argument, for their resolution because it is obvious that the statutes in question violate equal protection and that the Colorado Supreme Court has erred in it's opinion. The question is also one that is in conflict with other jurisdictions. The question may also be one of first impression for this court as Appellant has been unable to find one decided by this Court pertaining to this question, Appellant does not have access to all the cases however. The question is also one that has also been raised in another case that arose out of the same criminal incident and is now before the Colorado Appellate Court in No. 82CA1420. The interests of justice also require the Court to consider this question at this time as the Colorado Courts are improperly prosecuting it's citizens for a felony when it should only be a class 2 petty offense.

WHEREFORE, Appellant requests that he be granted probable jurisdiction on the foregoing grounds.

DATED NOVEMBER 15, 1983.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

CERTIFICATE OF MAILING

This is to certify that I have duly served the within Jurisdictional Statement and Motion For Leave to Proceed in Forma Pauperis by depositing copies of the same in the United States mail, with first-class postage prepaid, here at Shadow Mountain Correctional Facility, Canon City, CO 81212 this 16th day of November 1983. To the best of my knowledge the mailing described above took place on the above date, in the above described manner and within the permitted time pursuant to Rule 28 and addressed as follows:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Office of the District Attorney
Seventh Judicial District
State of Colorado
P.O. Box 1849
Montrose, Colorado 81401

Richard Velasquez

Richard Velasquez #01758 Pro Se
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

STATE OF COLORADO }
COUNTY OF FREMONT } ss.

Subscribed and sworn to before me this 16th day of November 1983.

Richard A. Murray
NOTARY PUBLIC

P O Box 700
ADDRESS

Canon City, Co. 81212.
ADDRESS

My Commission expires:
August 31, 1985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VELASQUEZ,

Defendant-Appellant,

83-59[illegible]

v.

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Defendant-Appellant, Richard Velasquez, asks leave to file the attached Jurisdictional Statement, Appeal from the Supreme Court of Colorado No. 82SA32, without prepayment of costs and to proceed in forma pauperis. Defendant-Appellant has previously been granted leave to so proceed in both the trial court, District Court of Montrose County, State of Colorado, and The Supreme Court of Colorado. Defendant-Appellant's affidavit in support of this motion is attached hereto.

Richard Velasquez
Defendant-Appellant

AFFIDAVIT

I, Richard Velasquez, being first duly sworn according to law, depose and say that I am the Defendant-Appellant in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am presently incarcerated in the Department of Corrections, Canon City, Colorado, Shadow Mountain Facility and thus an unemployed. I have been so incarcerated since December 18, 1981. I do work here at the Facility and now receive $30.00 per month incentive pay. My total wages for this year are $234.72 and my total for my entire incarceration is $385.04. I did work prior to being incarcerated but cannot remember what my income was. To the best of my knowledge I earned a gross income of between $2,000.00 and $3,000.00 for 1981.

2. I have received no other income than that mentioned above during the last twelve months other than money orders totaling $75.00 and an occasional book of stamps that I have received from my family.

3. I do not own any cash or checking or savings account other than the one that is kept here at the Facility for my incentive pay and there is never anything in there except for the first of the month when I am paid.

4. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property except for my law books, typewriter, TV and other small items they allow us to have here at the Facility.

5. I have no dependents other than myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard Velasquez
Defendant-Appellant

State of Colorado
County of Fremont
Subscribed and Sworn to Before
me this 14th day of December, 1983.

Diane M. Grant
Notary Public

My commission expires
Aug. 4, 1986

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VELASQUEZ,

Defendant-Appellant

v.

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee.

MOTION FOR DISCOVERY AND FOR INSPECTION OF THE RECORD

The Defendant-Appellant, Richard Velasquez, asks leave to file the above captioned motion for discovery and for inspection of the record and prays that the Court grant such motion and as grounds therefore states as follows:

1. That Defendant-Appellant has filed a Jurisdictional Statement in an Appeal from the Supreme Court of Colorado No. 82SA52 but has not cited from the transcript of that case but has simply stated the facts from his own notes and memory. This is due to the fact Defendant-Appellant was denied a free copy of the Reporter's original transcript of the proceedings pertaining to this issue by both the trial court, District Court of Montrose County, State of Colorado, and The Supreme Court of Colorado. Defendant-Appellant filed a motion for this in the District Court, Montrose County, State of Colorado on September 27, 1982 which was denied October 6, 1982 (p. 6 of the record), the court stating that the appeal in this case had been perfected in the Supreme Court and accordingly no longer had jurisdiction and said motion should be addressed to the Supreme Court.

Defendant-Appellant then filed a motion for discovery in the Supreme Court of Colorado dated October, 29, 1982 and a motion to reconsider motion for discovery dated December 2, 1982 which were denied En Banc November 10, 1982 and January 13, 1983. In support of such motions Defendant-Appellant cited Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956) and stated that a failure to grant such request violates his rights of due process and equal protection and access to the courts. Defendant-Appellant was not granted a copy of the transcript nor allowed to use the record for preparation of his briefs and such.

The transcript requested is the transcript of all proceedings held May 24 and 25, 1982. This is the jury trial and all arguments pertaining to the discussion of the Motion to Dismiss including all expert testimony of Agent Gary Koverman, Criminalist Nelson K. Jennett and Dr. Robert K. Lantz, whether before the jury or in camera.

2. That Defendant-Appellant also requested to be allowed to borrow the entire record to use while preparing his briefs and such but was also refused this. Defendant-Appellant was given an Index prepared by the Clerk of the District Court of Montrose County, State of Colorado but could not determine what all the items listed were and many appeared to be items that Defendant-Appellant did not have in his file and thus Defendant-Appellant requested inspection of the record for this reason also. Defendant-Appellant requested this prior to the record being sent to the Supreme Court of Colorado also as he was in the county jail in Montrose, Colorado when he was given the Index but his request was refused and the record mailed anyway.

WHEREFORE, Defendant-Appellant prays that his Motion For Discovery and for Inspection of the Record be granted on the foregoing grounds.

DATED DECEMBER 14, 1983.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

CERTIFICATE OF MAILING

This is to certify that I have duly served the within Jurisdictional Statement and Motion For Leave to Proceed in Forma Pauperis which had previously been filed November 21, 1983 but were returned with a request to refile them along with an affidavit which is now included herein and a Motion For Discovery and For Inspection of the Record by depositing copies of the same in the United States mail, with first-class postage prepaid, here at Shadow Mountain Correctional Facility, Canon City, CO 81212 this 14th day of December 1983. To the best of my knowledge the mailing described above took place on the above date, in the above described manner and within the permitted time pursuant to Rule 28 and addressed as follows:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

A copy of the affidavit and the Motion For Discovery and For Inspection of the Record was mailed in the above described manner addressed to:

Office of the District Attorney
Seventh Judicial District
State of Colorado
P.O. Box 1849
Montrose, Colorado 81401

Richard Velasquez

Richard Velasquez #01736 Pro Se
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

State of Colorado
County of Fremont

Subscribed and Sworn to Before
me this 14th day of December, 1983.

My commission expires
Aug 4, 1986

Diane M. Arant
Notary Public

DISTRICT COURT, COUNTY OF MONTROSE, STATE OF COLORADO

Montrose County, Colorado
MAY 26 1982
Shirley J. Jackson, Clerk

Case No. 81 CR 63

ORDER

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

RICHARD VELASQUEZ,

Defendant.

The testimony by the drug identification experts in this case established that the resin extracted from the plant cannabis sativa L., either by physical means, such as walking through a field of plants with a vest on that would cause the resin to stick to the vest, or beating the plant on a wall and then collecting the resin that comes off, or by chemical means such as chopping up the plant and boiling it in solvents so as to cause the resin to remain, would then constitute "marijuana concentrate" or "hashish" (the terms being synonymous). Defendant then contended that this would mean that resin so extracted would fit either the definition of "marijuana" under 12-22-303 CRS 1973 (as amended), subsection (17) or under the definition of "marijuana concentrate" (hashish) under subsection (18) and thus the penalty in his case could be a class 2 petty offense under 18-18-106 (1) CRS 1973 (as amended) --the evidence established that he possessed less than an ounce -- or a class 5 felony under 18-18-106 (4) upon the determination that the substance was marijuana concentrate. This Court interpreted this to be an equal protection of the laws argument under the Constitution.

A review of that part of subsection (17) of 18-22-303 that provides that "marihuana" or marijuana" means "... the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or its resin" and subsection (18), coupled with the expert identification of marijuana concentrate (hashish) referred to above leads this Court to the conclusion that Defendant could indeed be punished differently for the exact same acts; that is the possession of resin extract from the plant cannabis sativa L.

Since different degrees of punishment for the same acts could be proscribed under subsections (1) and (4) of 18-18-106 CRS 1973 (as amended) this would be violative of Defendant's right to equal protection of the laws. See People v McKenzie 169 C 521, 458 P 2d, 232, People v Calvaresi, 188 C 277, 534 P 2d 316, People v Domingus 193 C 468, 568 P 2d 54, People v Bramlett 194 C 205, 573 P 2d 94, and People v Montoya 196 C 111, 582 P 2d 673. This Court is not unmindful of the case of People v Magoon, VI Brief Times Reporter 91 (February 4, 1982), but finds that it is not controlling in that it did not address the very specific issue set forth above.

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It appears to this Court that the Legislature attempted to make a reasonable distinction in that marijuana concentrate would be more potent, more easily transported and more easily concealed, but in spelling out the definitions of marijuana and marijuana concentrate they allowed the definitions to overlap.

This Court finds 18-18-106 (4) unconstitutional as applied to this Defendant and the case is therefore dismissed. The People elected not to pursue this case as a class 2 petty offense.

The Court also notes, but did not rule on the testimony of Dr. Robert Lantz, who was a well-qualified expert, that as a chemist he found the definitions referred to above as being vague.

DONE this 26th day of May, 1982.

BY THE COURT:

Jerry D. Lincoln
JERRY D. LINCOLN, District Judge

xc: DA ✓ Velasquez ✓ Roushar, DA 5/28/82 OD

Received 9/24/82 (PJ)

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COLORADO BUREAU OF INVESTIGATION

CBI Lab Case No. 81-4149

LABORATORY REPORT

SUSPECT VELASQUEZ, Richard, DOB 1/4/55
Full Name, Race, Sex, Date of Birth, Address

VICTIM City of Montrose
Full Name, Race, Sex, Date of Birth, Address

OFFENSE Possession of Marijuana Concentrate DATE SUBMITTED 12/1/81

REQUESTING AGENCY Montrose Police Department CASE No.

SUBMITTING OFFICER G.R. Lillard, Patrolman RECEIVED BY G. Koverman

EXHIBIT	DESCRIPTION
1	One sealed and marked plastic bag containing: A. One sealed and marked plastic bag containing a plastic bag containing green vegetable material (6.52 grams). B. One sealed and marked plastic bag containing a plastic bag containing green vegetable material (6.85 grams).
2	One sealed and marked plastic bag containing: A. One piece of aluminum foil containing brown resinous material (0.61 grams). B. One piece of aluminum foil containing brown resinous material (0.35 grams).
3	One sealed and marked plastic bag containing: A. One plastic bag containing brown resinous material (0.73 grams). B. One piece of aluminum foil containing brown resinous material (0.63 grams).

RESULTS OF EXAMINATIONS: Examinations and tests disclosed the presence of Cannabis sativa L in Exhibits 1B, 1C, 2B, 3B, and 3D.

EXAMINED BY _____ DATE COMPLETED 12/1/81
Gary R. Koverman, Criminalist/Agent

2002 South Colorado Boulevard, Denver, Colorado 80222 (303) 759-1100
P.O. Box 47, Montrose, Colorado 81401 (303) 249-8621
3416 N. Elizabeth Street, Pueblo, Colorado 81008 (303) 542-1133

also p. 23 of index

CBI CL1-40R

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 82SA352

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant v. RICHARD VELASQUEZ, Defendant-Appellee	)	July 18, 1983

Appeal from the District Court

of the

County of Montrose

Honorable Jerry D. Lincoln, Judge

EN BANC

JUDGMENT DISAPPROVED

John A. F. Wendt, Jr., District Attorney
Michael H. Argall, Assistant District Attorney
Montrose, Colorado

Attorneys for Plaintiff-Appellant

Richard Velasquez, Pro Se
Montrose, Colorado

Defendant-Appellee

JUSTICE QUINN delivered the opinion of the Court.

The People appeal[1] from a judgment of dismissal entered at the conclusion of the trial evidence. The trial court granted the motion of the defendant, Richard Velasquez, to dismiss the charge of possession of a marihuana concentrate, namely hashish, section 18-18-106(4)(b)(I), C.R.S. 1973 (1982 Supp.), on the ground that the conduct proscribed by this class 5 felony offense is indistinguishable from the conduct proscribed by the class 2 petty offense of possession of "not more than one ounce of marihuana," section 18-18-106(1), C.R.S. 1973 (1982 Supp.), and that, therefore, the application of the felony statute to the defendant violated equal protection of the laws. U.S. Const. Amend. XIV; Colo. Const. Art. II, Sec. 25.[2] We disapprove the judgment of dismissal.

I.

The facts are not in dispute. The defendant was arrested on December 1, 1981 for driving under the influence of intoxicating liquor. In the course of a custodial search of the defendant, the arresting officer uncovered several small tinfoil packets of a brown resinous substance which he suspected to be hashish. Laboratory analysis performed by

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1/ The People's appeal is pursuant to the legislative authorization found in section 16-12-102, C.R.S. 1973 (1978 Repl. Vol. 8). Because the judgment of dismissal was entered after jeopardy had attached, double jeopardy principles, U.S. Const. Amends. V and XIV; Colo. Const. Art. II, Sec. 18, preclude the reinstatement of the charges against the defendant. E.g., People v. Quintana, 634 P.2d 413 (Colo. 1981); People v. Paulsen, 198 Colo. 458, 601 P.2d 634 (1979). We, therefore, can only approve or disapprove the trial court's judgment and cannot order a new trial when the judgment is disapproved.

2/ The right to equal protection of the laws finds support in the Due Process Clause of the Colorado Constitution, Article II, Section 25. E.g., Heninger v. Charnes, 200 Colo. 194, 613 P.2d 884 (1980); Vanderhoof v. People, 152 Colo. 147, 380 P.2d 903 (1963).

the Colorado Bureau of Investigation confirmed the officer's suspicion. The defendant was accordingly charged with the class 5 felony of possession of a marihuana concentrate, namely hashish, and trial to a jury commenced on May 24, 1982.

Both the prosecution and the defense presented expert testimony identifying the material in question as hashish and describing the manner in which hashish is made. Ordinarily, marihuana is made by grinding up the leaves and other parts of the marihuana plant. The expert testimony was that the leaves of the plant exude a resin, possibly as a means to avoid dehydration. This resin can be clearly identified under microscopic examination and contains the pharmacologically active agent Delta 9 Tetrahydrocannabinol (THC), which produces a state of intoxication in the user. The amount of THC in ordinary marihuana is only .05 to 1 percent of the total quantity of material. Hashish, in contrast, is made by extracting the resin directly from the marihuana plant, permitting it to dry, and then compressing it. The THC concentrate in hashish is considerably greater than the THC concentrate in ordinary marihuana, as much as eight to twenty times according to the prosecution's expert witness.

At the conclusion of the evidence the trial court dismissed the charge of possession of a marihuana concentrate, reasoning as follows: marihuana, as defined in section 12-22-303(17), C.R.S. 1973 (1982 Supp.), means "all parts of the plant cannabis sativa L.,"[3] including "the

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3/ Section 12-22-303(17), C.R.S. 1973 (1982 Supp.), defines "marihuana" as follows:

> "'Marihuana' or 'marijuana' means all parts of the plant cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include

(Continued)

resin extracted from any part of the plant;" the term "marihuana concentrate," as defined in section 12-22-303(18), C.R.S. 1973 (1982 Supp.), includes "hashish,"[4] which, according to the expert testimony at trial, is made from the resin extracted from the plant cannabis sativa L.; thus, "hashish" satisfies the definition of both "marihuana" and "marihuana concentrate," and the difference in penalty for possessing this substance violates equal protection of the laws. The People then pursued this appeal.

II.

The People contend that the trial court erred in dismissing on equal protection grounds the felony charge of possession of a marihuana concentrate. In the People's view, a marihuana concentrate such as hashish is readily distinguishable from and potentially more intoxicating than marihuana and, therefore, the legislative decision to classify and punish possession of hashish differently than the possession of marihuana is a reasonable exercise of its lawmaking function. We agree with the People's argument.

Basic and elementary principles of constitutional adjudication must guide our analysis. A statute in the first instance is presumed to be constitutional, and the burden

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3 (Continued)

> the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, cake, or sterilized seed of the plant which is incapable of germination."

4/ Section 12-22-303(18), C.R.S. 1973 (1982 Supp.), defines "marihuana concentrate" as follows: "'Marihuana concentrate' means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols."

falls upon the person attacking the statute to establish its unconstitutionality. E.g., People v. Alexander, ____ P.2d __ (1983) (S. Ct. No. 81SA363, announced May 9, 1983); Bollier v. People, 635 P.2d 543 (Colo. 1981); People v. Summit, 183 Colo. 421, 517 P.2d 850 (1974). Where, as here, a statute does not infringe upon a fundamental right or involve a suspect classification, a statutory classification, in order to withstand an equal protection challenge, need only rest upon some reasonable basis in fact and be reasonably related to a legitimate governmental interest. E.g., Dawson v. Public Employees Association, et al., ___ P.2d ___ (Colo. 1983) (S. Ct. No. 81SA187, announced May 31, 1983); Heninger v. Charnes, 200 Colo. 194, 613 P.2d 884 (1980); People v. Summit, supra. While equal protection of the laws prohibits the punishment of identical criminal conduct with disparate penalties, e.g., People v. Marcy, 628 P.2d 69 (Colo. 1981); People v. Bramlett, 194 Colo. 205, 573 P.2d 94 (1977), cert. denied, 435 U.S. 956, 98 S. Ct. 1590, 55 L. Ed. 2d 808 (1978), criminal legislation is not constitutionally infirm simply because the offender's conduct may violate more than one statutory proscription. It is only when "the same conduct is proscribed in two statutes, and different criminal sanctions apply, that problems arise under equal protection ...." People v. Taggart, 621 P.2d 1375, 1382 (Colo. 1981), quoting People v. Czajkowski, 193 Colo. 352, 356, 568 P.2d 23, 25 (1977). A review of the statutory scheme in question satisfies us that there is a sufficient difference between the possession of marihuana and the possession of a marihuana concentrate, such as hashish, to justify the resulting differential in classification and penalty adopted by the legislature.

The premise underlying the district court's ruling is that the statutory definition of marihuana is broad enough to include hashish and, therefore, there is no reasonable basis to support the felony classification and harsher penalty for possession of hashish as a marihuana concentrate. To be sure, hashish, which is made from the resin of the marihuana plant, satisfies both the statutory definition of marihuana in section 12-22-303(17), C.R.S. 1973 (1982 Supp.) and the statutory definition of marihuana concentrate in section 12-22-303(18), C.R.S. 1973 (1982 Supp.). Because hashish is marihuana, however, does not mean that all marihuana is hashish. On the contrary, as the expert witnesses testified in this case, crude or ordinary marihuana consists of ground-up leafy and bulky material from the marihuana plant. Because the leaves secrete the potent resin, crude marihuana undoubtedly will contain some of this resinous material. Hashish, on the other hand, is made directly from the resin secreted by the leaves.[5] This resin is clearly identifiable by microscopic examination and is readily distinguishable from the other parts of the plant.

Although both hashish and nonconcentrated marihuana contain THC, the pharmacological agent responsible for the intoxicating effect on the user, hashish is far richer in THC than the crude or ordinary type of marihuana. See E. Brecher, Licit and Illicit Drugs 400 (1972); L. Goodman and

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5/ The expert testimony adduced at trial indicated that there are several methods of extracting the resin from cannabis plants. One method is to grind the plant and mix it in a solvent. The solvent will extract the resin from the other parts of the plant, which then can be discarded. The solvent is then boiled out of the resinous remainder, and the residue is compressed and dried. A more primitive method is to simply wear a burlap apron and walk through rows of marihuana plants. The resinous material will adhere to the apron, and can ultimately be scraped off. It also is then compressed.

A. Gilman, The Pharmacological Basis of Therapeutics 298-300 (4th ed. 1970); see also United States v. Cimoli, 10 M.J. 516 (A.F.C.M.R. 1980); United States v. Lee, 1 M.J. 15 (C.M.A. 1975); State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (1978), appeal dismissed, 440 U.S. 952, 99 S. Ct. 1487, 59 L. Ed. 2d 765 (1979). The high concentration of THC in hashish will undoubtedly produce a greater alteration in the user's conscious state, with concomitant distortions of perception and loss of control. Hashish, therefore, poses a more serious danger to the user and to the public in general than a similar amount of marihuana in nonconcentrated form.[6]

We are satisfied that the greater concentration of THC in hashish provides a reasonable basis for the legislature's decision to classify hashish as a marihuana concentrate and to punish the crime of possession of a marihuana concentrate more severely than the crime of possession of not more than one ounce of crude or nonconcentrated marihuana. See State v. Floyd, supra (rejecting equal protection challenge to statutes penalizing possession of hashish more severely than possession of marihuana, the court noting that

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6/ We recognize that because both hashish and ordinary marihuana originate from the same source, the plant cannabis sativa L., close questions may arise in some cases as to the appropriate categorization of the substance as one or the other. For example, the proportion of the bulky, nonresinous plant material admixed with the resin may be such that expert witnesses may be unable to state that the resulting substance satisfies the pharmacological criteria of hashish. We view this problem as a problem of proof and not as one of constitutional infirmity affecting the statutory classification. The prosecution bears the burden of presenting evidence from which a reasonable person could conclude beyond a reasonable doubt that the character of the substance in question does satisfy the pharmacological criteria of hashish. If the evidence will not support this conclusion, then the prosecution will not have sustained its burden of proof on this element of the offense. In the present case, however, no such problem exists. All the expert witnesses who testified in this case were of the opinion that the substance in question was indeed hashish.

the greater concentration of THC in hashish "may render it more susceptible to serious and extensive abuse than bulkier marihuana, easier to conceal, hence more difficult to detect and seize"); State v. Petrie, ___ Hawaii ____, 649 P.2d 381 (1982) (state has a legitimate interest in punishing those charged with promotion of hashish more severely than those charged with the promotion of marihuana, the court noting a legislative report indicating that the concentration of THC in hashish results in more dangerous effects than marihuana and stressing that penalizing the former more severely would help warn the public of the greater danger). This difference in treatment for the two offenses is reasonably related to the state's legitimate interest in prohibiting the possession and use of drugs and other intoxicants that pose a danger to the user and the general public. We therefore conclude that the statutory proscription for the crime of possession of a marihuana concentrate, namely hashish, does not violate equal protection of the laws.

The judgment of the district court is disapproved.

SUPREME COURT, STATE OF COLORADO

Case No. 82 SA 352

APPEAL FROM THE DISTRICT COURT, MONTROSE COUNTY

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

RICHARD VELASQUEZ,

Defendant-Appellee.

Upon consideration of the Petition for Rehearing of the Defendant-Appellee received herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Petition shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, AUGUST 18, 1983

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

AUG 19 1983

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By _____ Deputy Clerk

cc: Richard Velasquez
P.O. Box 700, Unit 4
Canon City, CO 81212

Michael H. Argall
Assistant District Attorney
P.O. Box 1849
Montrose, CO 81402

SUPREME COURT STATE OF COLORADO

SUPREME COURT, STATE OF COLORADO

CASE NO. 82SA352

Appeal From The District Court, Montrose County, Colorado, No. 81CR63
The Honorable Jerry D. Lincoln, District Judge

NOTICE OF APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

Notice is hereby given that the above named Defendant-Appellant, Richard Velasquez, hereby appeals to the Supreme Court of the United States of America from the Judgment and Opinion of July 18, 1983 in which the Supreme Court of Colorado disapproved of the Judgment of dismissal by the District Court, Montrose County, Colorado. Rehearing was denied En Banc on August 18, 1983.

Jurisdiction for this appeal is pursuant to 28 USCA §1257 and Rules 10-12 of the Supreme Court of the United States of America.

DATED NOVEMBER 4, 1983.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

Filed In The ——— Court
[illegible] Colorado
NOV - 3 1983
Shirley J. [illegible], Clerk

SUPREME COURT, STATE OF COLORADO

CASE NO. 82SA352

Appeal From The District Court, Montrose County, Colorado, No. 81CR83
The Honorable Jerry D. Lincoln, District Judge

NOTICE OF APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

Notice is hereby given that the above named Defendant-Appellant, Richard Velasquez, hereby appeals to the Supreme Court of the United States of America from the Judgment and Opinion of July 18, 1983 in which the Supreme Court of Colorado disapproved of the Judgment of dismissal by the District Court, Montrose County, Colorado. Rehearing was denied En Banc on August 18, 1983.

Jurisdiction for this appeal is pursuant to 28 USCA §1257 and Rules 10-12 of the Supreme Court of the United States of America.

DATED NOVEMBER 4, 1983.

Respectfully Submitted,

Richard Velasquez

Richard Velasquez, Pro Se #01756
Montrose, Colorado
P.O. Box 700 Unit 4
Canon City, CO 81212

Filed in The _____ Court
Montrose County, Colorado

NOV - 8 1983

Shirley J. Jackson, Clerk ___

SUPREME COURT, STATE OF COLORADO

CASE NO. 82SA352

Appeal From The District Court, Montrose County, Colorado, No. 81CR63
The Honorable Jerry D. Lincoln, District Judge

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD VELASQUEZ,

Defendant-Appellant.

Pursuant to Rule 13 of the Supreme Court of the United States of America Defendant-Appellant, Richard Velasquez, hereby designates for inclusion in the record on appeal to the Supreme Court of the United States of America, taken by Notice of Appeal which accompanies this Designation of Contents of Record on Appeal, the following record and proceedings in this case:

1. The entire record that was before the Supreme Court of Colorado on appeal in the above captioned cause.

2. All original Process, Pleadings, Motions and any paper filed in the Supreme Court of Colorado on appeal in the above captioned cause.

3. All Judgments and Orders of the Supreme Court of Colorado concerning the above captioned cause.

4. Defendant-Appellant's Opening brief and Petition For Rehearing, Plaintiff-Appellee's Answer Brief and the Opinion of the Supreme Court of Colorado of July 18, 1983. All of the preceding concerning the above captioned cause.

5. The within Designation of Contents of Record on Appeal and Notice of Appeal.

DATED NOVEMBER 4, 1983.

Respectfully Submitted,

Richard Velasquez

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P.O. Box 700 Unit 4
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